U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 27Aug2001

Case No.: **1999-LHC-2363**

OWCP No.: **14-126852**

In the Matter of:

LORAN THEBERT,
Claimant,

v.

HARRIS SAND AND GRAVEL, INC.,
Employer,

and

FREMONT COMPENSATION INSURANCE GROUP,
Carrier.

DECISION AND ORDER APPROVING SETTLEMENT

I, the undersigned Administrative Law Judge, pursuant to the provisions of Section 8(i)(l) of the Longshore and Harbor Workers* Compensation Act, having fully considered the foregoing Stipulations and Application for Settlement, finds and determines as follows:

1. The settlement is neither inadequate nor procured by duress, and I therefore approve it.

2. The Employer and Carrier shall pay directly to the Claimant the sum of $28,500.00 in full and final settlement of any and all claims under the LHWCA for disability compensation and past and future medical care and treatment arising out of the Claimant*s May 12, 1998 injury.

3. Pursuant to this agreement, the Claimant*s attorney waives all right to attorney fees and costs under the LHWCA. Claimant attorney fees and costs will be fully satisfied

through payment of fees pursuant to the settlement of the Jones Act and 905(b) claims.

4. Upon making the aforementioned payment, the liability of the Employer and Carrier for disability compensation and past and future medical care and treatment and claimant*s attorney*s fees and costs as a result of the Claimant*s May 12, 1998, and subsequent injuries and any resulting disabilities is hereby discharged.

A
RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
NEWPORT NEWS, VIRGINIA

In the matter of

LORAN THEBERT, Claimant,
v.

HARRIS SAND AND GRAVEL, INC., Employer,
and

FREMONT COMPENSATION INS.
GROUP, Carrier.

OALJ No. 1999-LHC-2363
OWCP No. 14-128080

STIPULATIONS AND APPLICATION FOR SETTLEMENT
UNDER 33 U.S.C. § 908(i) and PROPOSED ORDER

I. STIPULATIONS AND APPLICATION FOR SETTLEMENT

Claimant, Loran Thebert by and through his attorney of record, Michael Hough, and the Employer, Harris Sand and Gravel, Inc., and the Carrier, Fremont Compensation Insurance Group, by and through their attorneys of record, Raymond H. Warns, Jr., and Holmes Weddle & Barcott, represent that they have agreed to resolve this matter pursuant to Section 8(i)(1) of the Longshore and Harbor Workers* Compensation Act. 33 U.S.C. § 908(i)(l). In accordance with the regulations promulgated at 20 C.F.R. § 702.241-702.243, the parties hereby submit the following Stipulations and Application for Settlement and move the Office of Administrative Law Judges to approve the settlement and issue a compensation order pursuant to that approval.

As discussed below, this Longshore settlement is part of a combined settlement of numerous claims against Harris/Harris Sand and Gravel.

A. **STATEMENT OF FACTS**

Claimant suffered injury on May 12, 1998, when he suffered a right inguinal hernia when he slipped while carrying steel. At the time he was employed by Harris Sand & Gravel, Inc. in Valdez, Alaska. Exhibit 1.1. Claimant did not initially make claim under the Longshore and Harbor Workers* Compensation Act. On May 13, 1998, Claimant completed a report of Occupational Injury or Illness under Alaska*s Workers* Compensation Act. Exhibit 1.1.

On May 13, 1998, Claimant commenced treatment with Dr. Joseph Roth of the Valdez Medical Clinic. Dr. Roth concluded Claimant suffered a hernia which was likely to get worse. He recommended surgery. Exhibit 2.1. Dr. Roth*s chart notes throughout the month of April 1998 indicate that Claimant complained of hernia symptoms on both sides of his

abdomen. However, Dr. Roth could find no indication of hernia on the left side. This remained true throughout the surgical herniorrhaphy completed on May 22, 1998. Exhibit 2.2. The operative report specifically notes there was also no bulging noted in the left inguinal crease. As there was no bulging in the left inguinal crease, it was felt that we did not need to explore that area for hernia. In subsequent deposition, Dr. Roth testified that he could find no evidence of a left side inguinal hernia.

On June *5*, 1998, Dr. Roth removed the sutures and staples from the surgical site, and released Claimant to return to work with lifting restrictions no greater than 10 to 15 pounds, for approximately two weeks. Exhibit 2.3. By June 19, 1998, Dr. Roth concluded that Claimant*s wound and hernia site was not healing at a normal rate, and that he experienced pain and swelling. He therefore released Claimant from all work for at least two weeks. Exhibit 2.4. During the preceding two week period, Claimant shoveled asphalt, a work activity which both he and his physician agreed was beyond the limitations imposed by Dr. Roth. Moreover, Claimant admitted at deposition that he knew the work was in excess of his physical restrictions prior to the time he engaged in the shoveling of asphalt. On July 6, 1998, Dr. Roth released Claimant to work with limitations. He required that claimant engage in no rotational movement, and no lifting over 25 pounds. Exhibit *2.5*. Dr. Roth also referred Claimant to physical therapy, and specifically withheld any return to work until after that consult.

During the same week that Claimant returned to work shoveling gravel and asphalt and experienced symptoms at that time. He also alleges that he later incurred an injury working with lines aboard a tugboat.

Claimant was seen at physical therapy at Reclaim Health, Inc. on July 21, 1998. On examination, Claimant had complaints of increased pain with activity. In conjunction with the physical therapist stated goals were asserted. They included: (1) increase the mobility of trunk and right leg; (2) able to ride and compete on horses in the upcoming fall; and (3) return to all normal activities, including work as a welder/laborer. Exhibits 3.1 - 3.3.

On August 4, 1998, Claimant saw Dr. Ronald E. Gower in Anchorage, Alaska. Claimant recounted an original injury occurring on May 12, 1998, when he slipped and fell while carrying steel. He recounted for Dr. Gower as well that he reinjured himself approximately two weeks following the surgery in two events. The first concerned the light duty work shoveling gravel for two days, allegedly followed by a reinjury or aggravation caused by lifting heavy tow lines on the tugboat in mid-June. Specifically, while lifting during the handling of lines he felt a ripping sensation in his groin, and recounted that he thought his hernia repair separated. He noted swelling in his groin following this event. Exhibit 4.1. Dr. Gower asserted rather unequivocally that he would not have released Claimant to return to the aforementioned work during the six weeks following surgery. However, he also found on examination that there was no evidence of recurrence of the hernia. Dr. Gower reported that Claimant expressed a belief that he was recovering, and that he wanted to return to normal duties. Dr. Gower recommended that he could return to his previous duties but should avoid heavy lifting, defined as 100 pounds or greater. However, Dr. Gower was quick to add that he would make the same recommendation fQr any

individual. Exhibit 4.2.

On August 24, 1998, Dr. Roth prescribed physical therapy for purposes of scar reduction. Exhibit 2.6. Claimant undertook physical therapy for that purpose. Exhibits 2.7 - 2.9. On September 3, 1998, Dr. Roth reviewed and concurred in the conclusions of Dr. Gower with some modification. Specifically, he believed that Claimant would have difficulty working with normal weights, and believed he was having rotational limitations. He therefore recommended physical therapy to work on range of motion and to reduce scar tissue. Exhibit 2.10.

Thereafter, Claimant moved to Colorado. On January 18, 1999, he consulted with Dr. Thomas R. Brown, M.D., regarding ongoing and recurrent hernia pain at the site of his right inguinal hernia. Claimant asserted that this pain became acute when Claimant attempted to do some horseback riding in anticipation of elk hunting. He asserted that he was incapable of this activity. Dr. Brown diagnosed an ilioinguinal nerve entrapment which he found explained the pain distribution reported by the patient. He recommended a nerve block. Exhibit *5.1*.

For purposes of the nerve block, Dr. Brown referred Claimant to Dr. Ronald S. Hatton. On examination, he was able to confirm the previous pain complaints found by Dr. Brown. He proceeded with the ilioinguinal nerve block. Exhibits 6.1 - 6.4. During the examination, Dr. Hatton also heard from Claimant complaints of pain suggestive of a left leg radiculopothy, relatable to disc herniation. Accordingly, he raised the subject of an IvlIRI scan for diagnostic purposes.

On June 16, 2000, Claimant underwent an independent medical evaluation with Medical Evaluations Alaska. Having reviewed all the pertinent records and performed clinical evaluation, Dr. Scot G. Fechtel, D.C., M.D., concluded that Dr. Hatton*s nerve block produced a good result. Regarding the back, Dr. Fechtel concluded that the clinical examination suggested a lumbar disc. He also believed there was a possibility of an independent lesion causing thoracic symptoms. In a June 29, 2000 addendum, Dr. Fechtel indicated having reviewed the MRI of the lumbar and of the right hip. These findings comported with his conclusions after the clinical examination, and he affirmed his belief that there was no ruptured disc. Exhibits 7.1 7.6. Subsequently, on July 24, 2000, Dr. Fechtel reviewed MRI films of the thoracic spine, and supplemented his earlier report. Regarding the thoracic complaints, Dr. Fechtel found there was a schrnorl*s node which explained the patient*s pain complaints. However, he also stated unequivocally that based upon the description of Claimant*s injury, the occurrence of schmorl*s node could not have been caused by the May 12, 1998 injury. Exhibit 7.7.

Regarding the complaints of left hernia symptoms, Dr. Fechtel concluded that he was convinced there was something ascending the cord, but that it could not be related to the May 12, 1998 injury. Exhibit 7.8.

B. JURISDICTION

Claimant*s May 12, 1998, injury and its sequelea come under the jurisdiction of the Longshore and Harbor Workers* Compensation Act.

C. COMPENSATION AND **MEDICAL PAID**

To date, the Employer, in satisfaction of Claimant*s entitlement to benefits under the Longshore and Harbor Workers* Compensation Act, and/or in satisfaction of Claimant*s entitlements under the Alaska Workers* Compensation Act, has paid to claimant *$2,268.50* in temporary total disability, $7,810.15 in medical benefits, and *$3,550.31* in vocational rehabilitation benefits.

D. COST OF FUTURE MEDICAL CARE AND TREATMENT

Claimant*s treating physicians have not articulated a specific concern that he may in the future require additional medical care and treatment arising out of the April 12, 1998 right inguinal hernia. However, out of an abundance of caution, the parties have agreed to estimate future medical care and allocate an amount of money to cover that potential. Any conceivable future medical treatment would be more than adequately covered by an allowance of $5,000 for that purpose.

E. REASONS FOR SETTLEMENT

There is a bona fide dispute between the parties.

1. Claimant*s Contentions.

Claimant contends that the injuries which occurred on May 12, 1998 include **a right** inguinal hernia, which was surgically repaired by Dr. Roth, and a left inguinal hernia, which was not adequately diagnosed or treated at the time of surgery on May 22, 1998. Claimant further contends that he aggravated and exacerbated his condition when the Employer returned him to work in excess of his physical limitations in June 1998. Claimant also contends that he incurred aggravations of his preexisting hernia condition, and incurred a back injury in June 1998, while pulling lines while acting as a member of the crew aboard a tug. It is claimant*s contention that his allegations regarding the onset and source of these various injuries and aggravations are supported by the fact that he contemporaneously reported symptoms consistent with his position. It is Claimant*s contention that through some combination of subsequent aggravations in reemployment with Harris Sand & Gravel, he is entitled to recover under the Longshore and Harbor Workers* Compensation Act, including Section 908(b), the Alaska Workers* Compensation Act, the Jones Act, or some combination of these recovery schemes.

2. The Employer and Carrier*s Contentions.

The Employer/Carrier contend that Claimant was making a normal recovery following his surgery which occurred on May 22, 1998, and that he no longer suffers any ill effects of the May 12, 1998 right inguinal hernia. To the contrary, the Employer/Carrier contend that Claimant*s subsequent injury during horseback riding and ranch hand work in Colorado in the winter of 1998/1999 are the explanations for his current complaints. The Employer/Carrier contend that Claimant*s back condition has no relationship at all to the May 12, 1998 injurious event, and that the only injury which arose out of the events assigned that date was a right inguinal hernia. Furthermore, the Employer/Carrier contend

that Claimant did not suffer a left-sided hernia on May 12, 1998.

The Employer/Carrier*s position is supported by ample testimony. The treating physician, Joseph Roth, testified that he was unable to attribute Claimant*s back and leg complaints to the May 12, 1998 event. Dr. Roth also found no hernia on the left side at the time of surgery. He has testified that Claimant*s shoveling activities on June 19, 1998 worsened his right-sided hernia complaints in the sense that it slowed his recovery. Dr. Roth has testified that most people who have a hernia repair return to nonnal activities in six to eight weeks.

Dr. Fechtel saw Claimant at the behest of the Employer and Carrier. Like the treating physician, Dr. Fechtel can find no logical connection between Claimant*s back and leg complaints, and the right inguinal hernia which is attributed to the work events of May 12, 1998. Regarding the left hernia complaints, Dr. Fechtel has concluded Claimant has some pathology which explains those complaints, but at the same time can find no logical basis for attributing left-sided complaints to the work injury of May 12, 1998.

Regarding physical limitations, the treating physician, Dr. Roth, has deferred to a physical therapist. Dr. Fechtel likewise has deferred on the subject, though he suggests the parties consult with a general surgeon.

Dr. Roland Gower saw Claimant at the request of the Employer/Carrier. Dr. Gower is a general surgeon. He reviewed the records and performed a clinical evaluation on August 4, 1998. Dr. Gower has confirmed that Claimant had no back pain, no leg numbness, and no back complaints as of the date he evaluated Claimant. Like Drs. Roth and Fechtel, Dr. Gower found no left-sided hernia attributable to the events of May 12, 1998, or the subsequent shoveling aggravation attributed to date June 19, 1998. Finally, Dr. Gower has concluded that Claimant is able to lift up to 100 pounds, the maximum lifting he would allow any person, injured or not.

F. PROPOSED SETTLEMENT

1. In order to fully and adequately resolve claimant*s claims under the LHWCA, the Claimant and the Employer and Carrier agree to the following terms of settlement. Through a combination of contributions from the employer and the employer*s various insurers, Claimant will be paid a total of *$102,500*. Of this amount, *$28,500* is contributed by the employer*s Longshore and Harbor Workers* compensation, an amount which is specifically allocated, and agreed between the parties to fairly and accurately satisfy claimant*s entitlements under the Act, taking into consideration Claimant*s allegations, the medical records, and the testimony and conclusions of the consulting and treating physicians.

2. Over and above the amounts paid by the Longshore carrier, contributions to the overall settlement of the claims under Section 905(b), the Jones Act and the Alaska Workers* Compensation Act total $74,000. This amount is paid to claimant over and above his entitlement under the LHWCA.

3. From the total settlement amount, claimant*s attorney, Michael Hough will take the sum of

$10,929.37 in costs and *$25,675.00* in fees, in full and final satisfaction of claimant*s attorney*s claims for fees and costs under the Jones Act and 905 (b) claims, waiving all claims to fees and costs under the LHWCA. Claimant will receive a net total of *$65,895.63* from all of his claims against Harris/Harris Sand and Gravel. After satisfaction of Claimant*s entitlements under the LHWCA and satisfaction of his attorney*s claim for fees and costs, claimant will have an additional $37,395.63 over and above his entitlement under the LHWCA.

4. By agreeing to and signing this Agreement, claimant agrees to hold harmless all employers and their carriers for any claims for unpaid medical expenses that have been incurred as a result of any and all injuries discussed.

5. The parties acknowledge that this Settlement Agreement may not be modified once it becomes final.

6. The parties agree that there is no certain manner of determining the extent of claimant*s disability, whether temporary or permanent, as a result of the May 12, 1998 injury. Nonetheless, this settlement is considered to be adequate based upon the records of claimant*s medical condition, his vocational status, and the opinions of the treating and consulting physicians.

7. Should this agreement not be approved by the Administrative Law Judge the parties shall not be bound by any statement or agreement contained herein.

8. Upon approval of the Stipulations and Application for Settlement by the Administrative Law Judge and payment of the agreed upon sum, the liability of the Employer and Carrier for all compensation, past and future medical care and treatment, and attorney*s fees and costs resulting from claimant*s May 12, 1998, and subsequent injury and any resulting disabilities shall be fully discharged subject to the provisions specified herein.

9. It is the intent of the parties by the execution of this settlement agreement to fully release the Employer and Carrier from any additional liability for disability compensation and past and future medical care and treatment under the terms of the Longshore Act despite any grounds discovered subsequent to this agreement providing any basis for arguments of increased disability entitlement.

10. Claimant represents that he has read the contents of the Stipulations and Application for Settlement, or has had the Agreement read to him, and knows the representations contained therein to be true. He signs this document freely and voluntarily for the uses and purposes mentioned herein.

11. The parties acknowledge that this Agreement is void should claimant die prior to approval by the Administrative Law Judge.

WHEREFORE, the Claimant and the Employer and Carrier move the Administrative Law Judge to accept the Stipulations of Fact and approve the terms and conditions of the proposed

settlement and enter a compensation order incorporating such stipulations and settlement terms.

DATED: 7-10-01

/S/ Loran Thebert
LORAN THEBERT
Claimant

Address to Which Check is to Be Forwarded:

_____

DATED: 7-11-01

/S/ Michael Hough
MICHAEL HOUGH
Attorney for Claimant

DATED: 7-25-01

/S/ Raymond H. Warns, JR.
RAYMOND H. WARNS, JR.
Attorney for Employer/Carrier